Arroyo Grande Community Hospital, Inc. and Retail Clerks Union, Local 899, United Food and Commercial Workers International Union, AFL-CIO. Cases 31-CA-10701 and 31-RC-4891

March 24, 1982

DECISION AND ORDER

By Members Fanning, Jenkins, and Zimmerman

On November 10, 1981, Administrative Law Judge Roger B. Holmes issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in opposition to the exceptions of the General Counsel.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified below.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Arroyo Grande Community Hospital, Inc., Arroyo Grande, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following after the paragraph ending with "... be dismissed in its entirety":

"IT IS FURTHER ORDERED that Case 31-RC-4891 be, and it hereby is, remanded to the Regional Director for Region 31 for the purpose of issuing a revised tally of ballots and a Certification of Results of Election for the election conducted on March 6, 1981."

DECISION

ROGER B. HOLMES, Administrative Law Judge: Based on an unfair labor practice charge, which was filed on December 10, 1980, in Case 31-CA-10701 by Retail Clerks Union, Local 899, United Food and Commercial Workers International Union, AFL-CIO, the General Counsel issued on January 23, 1981, a complaint alleging violations of Section 8(a)(1) and (3) of the Act by Arroyo Grande Community Hospital, Inc.

Based upon a representation petition, which was filed on September 11, 1980, in Case 31-RC-4891, by the same union, a representation election was held on March 6, 1981, in a unit of the registered nurses employed by the employer at its hospital. The challenge to the ballot, which was cast in the election by the alleged discriminatee in the unfair labor practice case, must be resolved because the revised tally of ballots discloses that the vote in the election was: 16 votes for the Union, which is the charging party and the petitioner in this proceeding; no votes for Hospital and Service Employees Union, Local No. 399, Service Employees International Union, AFL-CIO; and 16 votes cast against those two participating labor organizations. Depending on the resolution of the challenged ballot, and if the Union achieves a majority of the valid votes in the final tally, then the Board indicated that it would at that time consider and rule upon the issues which were raised by the Employer's Objection 2(b) to the conduct affecting the results of the elec-

The hearing was held on September 3 and 4, 1981, at Santa Maria, California. The time for filing post-trial briefs was extended to October 26, 1981.

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The Board's jurisdiction is not in issue in this proceeding. The Respondent operates a hospital which is located at Arroyo Grande, California. The Respondent's operations meet the Board's jurisdictional standard for health care facilities.

The status of the Union as being a labor organization within the meaning of the Act is also not in dispute, and such status was admitted in the pleadings.

II. THE WITNESSES AND CREDIBILITY RESOLUTIONS

Seven witnesses testified at the hearing in this proceeding. The findings of fact to be set forth herein will be based on portions of the testimony given by those witnesses. In addition, the findings of fact will be based on stipulations, were joined in by the parties, and also documentary evidence, which was introduced by the parties at the hearing.

In alphabetical order by their last names, the following persons were called as witnesses at the hearing: Anne Gaebe Hall, who is the alleged discriminatee in this proceeding; Barbara Jones, who is a registered nurse and who was employed by the Respondent at the time of the hearing as a staff nurse in the intensive care unit; Dorothy Roe, who is the personnel and payroll director at the hospital; Maureen Shannon, who held three positions at

¹ The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

the hospital in June 1980 as relief supervisor, in-service, and quality assurance supervisor for nursing; Marie Whitford, who held the position of director of nursing at the hospital from June 1976 to February 1981, when she became employed by American Medical International, Inc., which owns the Respondent hospital and other hospitals; Michael L. Wolfram, who is the attorney for the Respondent in this proceeding; and Norbert Zimmerman, who formerly worked for the hospital during the period from January 1978 to September 1980.

After observing all of the witnesses testify and considering their demeanor, I have had to make several credibility resolutions because of conflicts in the versions of the facts given by different witnesses. I will set forth in the findings of fact the credited accounts, which are based on the portions of the witnesses' testimony which I find to be accurate and reliable.

Whitford demonstrated on the witness stand that she was a knowledgeable witness, and she testified with confidence and assurance in giving her recital of the facts. Whitford was convincing in her manner of testifying, and I will rely upon her version of the facts as being the credible version. In doing so, I am not unmindful that she made two errors while she was on the stand. One concerned the date of the meeting with her supervisors regarding the strike situation. She placed the date as being June 17, 1980, rather than June 20, 1980, as indicated in her pretrial affidavit. The other error is where she testified that she did not tell Hall in their June 22, 1980, conversation that she would get back to her with a response. Whitford acknowledged at that in her pretrial affidavit she had stated, "At the end of the conversation, I told Hall I would get back to her with a response, but I urged her to reconsider her decision." Considering the span of time between those events in June 1980, and the time that Whitford testified on September 3 and 4, 1981, I am not persuaded that Whitford's otherwise believable testimony at the hearing should be discredited. Accordingly, I continue to accept her account of the facts, with the two exceptions noted above, where the affidavit provides a more accurate account which was given closer in time to the occurrence of the events.

Having accepted the testimony of Whitford as being credible, I cannot accept other testimony which contradicts her account. In particular, this applies to certain testimony given by Hall and certain testimony given by Zimmerman. Therefore, I have relied on the portions of Hall's testimony only with regard to her union activities in support of the California Nurses Association and her description of her job duties and responsibilities.

The General Counsel acknowledges "that Zimmerman was somewhat confused about his dates" regarding a conversation between Zimmerman and Whitford and a conversation between Zimmerman and Hall. The General Counsel offers a rationalization of the inconsistency between Zimmerman and Hall, which theory adopts Hall's version. (See fn. 8 on p. 5 of the post-trial brief filed by counsel for the General Counsel.) The attorney for the Respondent urges, "Zimmerman's testimony about the call is confused and both internally inconsistent and inconsistent with Hall's testimony." He further argues, "These inconsistencies and conflicts with undis-

puted facts deprive the testimony about the Whitford-Zimmerman telephone call of any value." (See pp 27-29 of the post-trial brief filed by the attorney for the Respondent.)

I find that Whitford's testimony on the foregoing matter is the more reliable version. She placed the telephone conversation between her and Zimmerman at a later date which was subsequent to the termination of Hall. In this connection, Zimmerman also related a telephone call between those two persons at a later date. With regard to the other testimony offered by Zimmerman, I have relied on his account of an earlier change in his own status from a supervisory position to a staff nurse position, which also finds support in General Counsel's Exhibit 11.

With regard to the conflicts between the testimony of Hall and the testimony of Roe, I found Roe's account to be more credible, particularly in light of the discussion above regarding Hall's conflicts in testimony with Whitford.

A. The Stipulated Facts

The lawyers for both parties are to be commended for their efforts, prior to the opening of the hearing, to arrive at stipulations of fact regarding matters which were not in issue in this proceeding. Their efforts resulted in 13 agreed-upon stipulations of fact. Those stipulations are contained in one document, which was introduced into evidence as General Counsel's Exhibit 3. Considerable time and expense was saved as a result of this pretrial preparation by the attorneys. The stipulations are as follows:

IT IS HEREBY STIPULATED by and among Counsel for the General Counsel of the National Labor Relations Board and Arroyo Grande Community Hospital, Inc., herein called Respondent, as follows:

- 1. For purposes of this proceeding only, the parties stipulate that California Nurses Association, herein called CNA, is an organization which admits employees to membership and which exists, in part, for purposes of dealing with employers concerning wages, hours, and other terms and conditions of employment.
- 2. Respondent is owned or a subsidiary of American Medical International, Inc., herein called AMI.
- 3. AMI owns and operates two other hospitals in San Luis Obispo County. These are French Hospital and Sierra Vista Hospital.
- 4. At all times material herein, CNA was the exclusive collective-bargaining representative of the registered nurses of French Hospital in an appropriate unit
- 5. French Hospital and CNA had a collective-bargaining agreement covering the wages, hours and other terms and conditions of employment of the registered nurses at French Hospital, which by its terms expired on June 25, 1980. Prior to the expiration of the collective-bargaining agreement,

French Hospital and CNA engaged in negotiations for a new collective-bargaining agreement.

- 6. On June 10, 1980, CNA gave French Hospital notice, as required by Section 8(g) of the Act, of its intent to engage in a strike by its registered nurses commencing on June 25, 1980.
- 7. On June 17, 1980, CNA gave Sierra Vista Hospital notice, as required by Section 8(g) of the Act, of its intent to engage in a strike by its registered nurses commencing on June 30, 1980.
- 8. On June 24, 1980, CNA gave Respondent written notice, as required by Section 8(g) of the Act, of its intent to engage in a strike by its registered nurses commencing on July 4, 1980. Also on June 24, 1980, CNA made, in writing, a demand for recognition as the exclusive collective-bargaining representative of the registered nurses of Respondent. A copy of the notice and the demand for recognition are [contained in G.C. Exh. 3].
- 9. On June 25, 1980, the registered nurses at French Hospital went on strike. Nearly 100% of the French Hospital RNs participated in the strike. On June 30, 1980, the registered nurses at Sierra Vista Hospital went on strike. Approximately 50% of the Sierra Vista Hospital RNs participated in the strike. On July 4, 1980, the registered nurses at Respondent went on strike. Approximately 50% of Respondent's RNs participated. All strikes ended on July 22, 1980.
- 10. In San Luis Obispo County there are two hospitals which are not subsidiaries of AMI. These are San Luis Obispo County Hospital and Twin Cities Hospital. At all times material herein all five hospitals in the county were suffering from a shortage of nurses.
- 11. From June 21, 1980 to and including July 30, 1980, there existed RN staff nurse positions at Respondent's facility which Anne Gaebe Hall was qualified to fill with a normal amount of orientation. The parties expressly agree that this stipulation does not address the issue of whether there were any job openings in the emergency room, since this issue is in dispute.
- 12. From the time Anne Gaebe Hall was appointed supervisor or head nurse of the emergency room until June 21, 1980, she was a supervisor within the meaning of Section 2(11) of the Act. The parties expressly agree that this stipulation does not address whether or not Anne Gaebe Hall was a statutory supervisor from June 21, 1980 until her termination, since her status during this period is disputed.
- 13. The person who permanently replaced Anne Gaebe Hall as the emergency room supervisor had been a staff nurse in the emergency room prior to her promotion on September 28, 1980.

1. The events on Friday, June 20, 1980

Whitford held a meeting with her supervisors at the Respondent's hospital late in the afternoon of Friday, June 20, 1980. The meeting was prompted by Whitford's concern regarding the staffing of the hospital with nurses. The French Hospital and the Sierra Vista Hospi-

tal had received notices of the intention of their nurses to engage in a strike. (See section A, herein.) French Hospital had 138 beds and employed from 60 to 65 registered nurses. Sierra Vista Hospital had 172 beds and employed about 125 registered nurses. The Respondent had 79 beds and employed 49 to 50 registered nurses at that time. There were vacancies among the staff nurse positions at the Respondent's hospital. If strikes did occur at the French Hospital or the Sierra Vista Hospital, Whitford reasoned that it might mean increased patient load at the Respondent's hospital, or it could mean that nurses at the Respondent's hospital would be asked to leave the Respondent's hospital and fill in at the other two hospitals while their nurses were on strike.

Compounding Whitford's potential staffing problem at that time was the fact that a long holiday weekend was approaching. Because of the Respondent's geographical location near ocean beaches, a long holiday weekend meant an increase in the Respondent's patient load, particularly in the emergency room. There are five cities in the geographical area served by the Respondent hospital. They are: Pismo Beach, Avila Beach, Shell Beach, Grover City, and Arroyo Grande. In 1980, the Fourth of July holiday fell on a Friday, and thus a long and busy weekend was anticipated at the hospital.

At the meeting, Whitford discussed her concerns with staffing, and she told the supervisors "that I needed their absolute loyalty at that point in time; that I would expect them to work as many shifts and as many hours as we had to in order to keep the community going." Whitford also explained to the supervisors what they were permitted to do with respect to labor relations matters, and she told them what they were not permitted to do. She asked the supervisors to "keep their ears open and report back to me if there is a great deal of activity that we should be concerned about." She instructed the supervisors absolutely not to initiate conversations with employees on what was happening with regard to the CNA strikes.

Whitford distributed a memorandum to the supervisors at the meeting. A copy of that document was introduced into evidence as Respondent's Exhibit 4. In part, it states:

As indicated by the attached memorandum, you may ask employees whom you supervise whether they intend to strike or work. This question can be asked to assist you in planning coverage beginning Wednesday, June 25th, when the strike at French Hospital is scheduled to start.

It is very important for you to follow certain guidelines strictly in questioning employees:

- 1. Do not threaten or coerce any employee in any way.
- 2. Do not suggest in any way that an employee's job would be jeopardized if he or she engaged in a strike.
- 3. Do not question employees about anything concerning the union or strike except whether they intend to work and, if not, when they intend to

strike; you may listen, of course, to anything on these subjects that employees volunteer to you.

- 4. Do not ask employees in groups whether they intend to strike and when—ask this question in a one-to-one conversation.
- 5. Do not question employees in any supervisor's office.
- 6. Do let the employee know in some way that a response to your questions is voluntary but would be appreciated to assist scheduling.

Also on Friday, June 20, 1980, a memorandum was distributed by the Respondent to all of the employees at the hospital. A copy of that document was introduced into evidence as Respondent's Exhibit 5. In part, it states:

The hospital has been told by some employees that they intend to strike in support of striking French Hospital nurses. The hospital has an obligation to the community and its patients to insure the continuation of patient care if a strike does occur. In order to do this, we must begin planning work schedules for the strike period. Thus, you may be asked in the next few days, or you may already have been asked, by your supervisor or someone else in the administration whether you intend to strike and when.

The purpose of this question, of course, is to assist our planning of work schedules. You are free to make your own decision on whether to strike or to work. No reprisals will be taken against you whatever your decision may be.

I hope that you will inform us of your intention if you are asked, but if you choose not to respond to the question, the hospital will respect your choice and take no reprisals against you.

That same evening Hall decided to resign her supervisory position at the hospital. Hall composed a letter which she intended to submit the next day to the Respondent. She discussed her intentions with a doctor at the hospital and also with Mona Schultz and Sylvia Lyons, who were nurses working in the emergency room at the hospital. She also discussed the matter with Zimmerman at his house.

2. The events on Saturday, June 21, 1980

On Saturday, June 21, 1980, Maureen Shannon was working as supervisor of nursing. She was advised by Eva Logan, who was head of the medical records department, that she had typed a letter of resignation for Hall. About 25 or 30 minutes later, Hall gave her letter to Shannon in the hallway. Shannon testified, "There were no words exchanged, that I can recall. She just really kind of thrust it at me. She was in a hurry."

A copy of Hall's letter was introduced into evidence as General Counsel's Exhibit 4. In part, it states:

As of today, June 21, 1980, I am resigning my position as Supervisor of the Emergency Department. Current events make me realize I would be more ef-

fective in a staff position. I am available to continue working in the Department as scheduled.

Shannon took the letter into Whitford's office; she read the letter and then telephoned Whitford. Shannon testified:

I reached Mrs. Whitford at the bowling alley, where I knew she would be, and I verified that I had her and that she could hear me, because bowling alleys are kind of noisy, and she said that she could hear me, and I said, "Anne Gaebe Hall has resigned. She has turned in a written letter." And she said, "You are joshing," and I said, "No, do you want me to read the letter?" She said, "Yes." I read the letter in its entirety, and I said, "What do you want me to do?" And she said, "Nothing, I will take care of it." I said, "Do you want me to notify Mr. Palczer?" She said, "No, I will take care of everything, Maureen. Thank you very much."

And the conversation ended. She did instruct me where to put the letter.

A portion of the Employer's personnel handbook for employees, which was in effect in June 1980, was introduced into evidence as Respondent's Exhibit 6. In part, it states with regard to resignations submitted by management personnel, "Employees holding managerial positions, as determined by administration, are required to give a minimum of four weeks' notice."

Hall had worked for the hospital since August 1974. She was: a medicine nurse on the surgical floor; head nurse on the surgical floor; nurse in the recovery room; relief nurse in the emergency room; staff nurse in the emergency room, and since 1976 supervisor of the emergency department.

3. The events on Sunday, June 22, 1980

About 11 or 11:15 a.m. on Sunday, June 22, 1980, Whitford arrived at the hospital where she and Hall had a conversation in the emergency room lobby.

Whitford asked Hall if she knew what she was doing, and Whitford expressed the view that Hall was "overreacting." Hall replied that she wanted to know more about the issues. Whitford said that she would be glad to fill her in regarding what was taking place at the French Hospital. Whitford also asked Hall if she had consulted with Dr. James, and Hall said yes. Whitford told Hall that she would get back to her with a response. Whitford also urged Hall to reconsider her decision.

Whitford denied at the hearing that she had told Hall on that occasion that she accepted her resignation, and that Hall could continue working as a staff nurse.

Following her conversation with Hall, Whitford telephoned the hospital administrator, Louis Palczer, and informed him of the conversation with Hall. Palczer told Whitford that the next step was up to Hall. Whitford agreed and told him that she had better consult with the hospital's labor relations attorney.

Later that afternoon, while Whitford was riding in her car on her way home, she reached the conclusion that she could not accept Hall's resignation. Whitford testi-

fied, "Well, as I told you previously, my biggest problem facing Arroyo Grande Hospital was staffing, particularly as we were getting onto the beginning of French's strike, Sierra Vista's, and, at that point in time, my crucial concern was that I was going to have management people to keep that place going, and I felt that she was bugging out on me."

4. The events between June 22 and 27, 1980

On Monday morning, June 23, 1980, Shannon asked Whitford what decision she was going to make with regard to Hall's letter of resignation. According to Shannon, Whitford replied, "I don't think I will accept it."

Whitford also spoke with Eva McClure, who was the assistant director of nurses, and informed her of what was taking place regarding Hall. Whitford told McClure that she did not think that she was going to accept Hall's resignation, but that she would await advice from legal counsel.

Either on Monday, June 23, 1980, or Tuesday, June 24, 1980, Roe went into Whitford's office and asked her what they were going to do about Hall's letter. According to Roe, Whitford replied "Nothing," and she told Roe that Roe was to wait until decisions were made. Whitford said that she would inform Roe when such decisions were made.

While attorney Wolfram was in the San Luis Obispo area and conferring with management personnel at the French Hospital and the Sierra Vista Hospital, he received a telephone call on either Monday, June 23, 1980, or Tuesday, June 24, 1980, from Whitford. Wolfram testified:

On either Monday afternoon, June 23rd, or possibly Tuesday morning, June 24th, I received a telephone call from Mrs. Whitford at French Hospital, and she said, "Mike, over the weekend, one of my Head Nurses turned in a resignation, but she wants to continue working as a Staff Nurse, and I don't want to accept that resignation and let her work as a Staff Nurse, because I don't know what our situation is going to be and how many people we are going to need in the event the Nurses walk out of here."

I said, "Well, what is a 'Head Nurse?' What do they do at Arroyo Grande Hospital?" And she proceeded to describe for me the functions performed by Head Nurses at that Hospital. I said, "Marie, what has been the practice in the past? Do you allow employees and Supervisors to pick their positions at the Hospital, or do you retain some control over what positions they fill, according to what your particular needs are?" She says, "Well, of course I retain control and decide what they are going to do."

I said, "Marie, I think, from what you have told me, that this Head Nurse appears to be a Supervisor, and if she is a Supervisor, I think that, given your needs, you don't have to accept the resignation and put her in a staff position, but I don't want you to do anything now, because I have read recently of some cases that maybe will cause me to rethink what the legal rights and what your legal responsibilities are towards statutory Supervisors."

Wolfram advised Whitford not to do anything until she had heard from him on that matter. Wolfram then telephoned an associate in his law office in Los Angeles, and he requested that the associate research some recent decisions and advise him of the holdings.

During the time period covered by this section, Roe had two conversations with Hall. Roe recalled that Hall telephoned her on one occasion and inquired whether all of the staff nurses had to punch timecards. Roe responded, "Yes, but . . ." at which point Hall hung up the telephone. On another occasion, Hall asked Roe what she would be earning. Roe told her that she could not "quote a definite figure, but it would have been 14 percent more than she was earning at that time."

As part of her duties as the personnel and payroll director at the hospital, it was Roe's responsibility to prepare the necessary papers, such as payroll change forms, regarding an employee's change in status. During the week involved in this section, Roe did not receive any instructions from anyone to change Hall's status or Hall's pay rate, nor did Roe actually prepare such change of status paperwork.

During the week covered by this section, Hall continued to work on 4 days in the emergency room. Hall was not replaced that week in her supervisory position. Nevertheless, Hall asserted at the hearing that she did not perform any supervisory functions during those 4 days. Prior to June 21, 1980, her supervisory tasks only took up about 25 percent of her working day, because 75 percent of her worktime was spent on the same duties as were performed by nonsupervisory staff registered nurses in the emergency room. She acknowledged at the hearing during cross-examination that certain supervisory functions, which she had performed in the past, did not arise during the 4 days that she worked that week. For example, the work schedule for the month of July had already been prepared and turned in by Hall about June 15, 1980. Although Hall said that her work schedule had not been complete, she agreed that "I had done all that I could do." Since the work schedule for August would not have been submitted until about July 15, 1980, that supervisory function was not required to be done during the week in question. As a supervisor, Hall had attended the emergency care committee meetings. Those meetings had been held only once a month, and there was no emergency care committee meeting schedule to be held that week. Thus, that particular supervisory duty was not required to be done that week. As a supervisor, Hall had performed employee evaluations, but no employee evaluations were scheduled to be done that week. There were no overtime hours worked that week to be approved and there were no "call-ins" which had to be arranged by her. Hall did not recall that any suppliers were ordered for the emergency room that week, but, in any event, a nonsupervisory staff nurse had the authority to do so if it were necessary. Hall did decline to approve a change in days off, which two staff nurses had desired to make that week. Hall told the nurses that she did not do that function any more.

Whitford was not aware that week that Hall was performing her duties any differently from the way Hall had performed in the past. Whitford did not observe Hall punching a timeclock. However, in the course of Whitford's duties, she normally reviewed the timecards only of head nurses and supervisors. Whitford did review and initial Hall's timecard for the week ending June 27, 1980.

During the time period involved in this section, Hall continued her activities in support of the California Nurses Association. Prior to that time, she had discussed the CNA with staff nurses and with supervisors. She had also posted articles at the hospital with regard to CNA, and she continued to do so that week. Hall held a meeting of staff nurses at her house on Manday, June 23, 1980. Authorization cards for the CNA were signed at that time, and also a petition was signed.

Whitford said at the hearing that she was not aware from any source or in any way that Hall had held meetings at her house in connection with CNA. She was also unaware that Hall had signed a union authorization card or that Hall had voted to go on strike. She did not observe Hall posting any materials at the hospital relating to CNA or a strike, and she did not hear about Hall having done so until "months later." Hall acknowledged at the hearing she did not recall ever seeing Whitford observe her when Hall was posting notices regarding CNA at the hospital. Hall also acknowledged that Whitford had not been present when Hall spoke with other persons regarding the CNA. Hall also stated that she did not tell Whitford that Hall felt that a union would be a good thing at the hospital and that Hall favored the Union.

5. The events on Friday, June 27, 1980

Between 5 a.m. and 6 a.m. on Friday, June 27, 1980, Whitford and Roe met in Whitford's office at the hospital to begin the preparation of the payroll for 180 to 200 employees. Usually, the paychecks were distributed at 3 p.m. on Thursdays, but due to the negotiations taking place at the French Hospital, it was not possible to do so. The Arroyo Grande Hospital and the Sierra Vista Hospital were going to adopt the new wage rates being negotiated at the French Hospital. Roe explained that she had spent 12 hours the previous day in meetings. Roe testified, "Well, I had brought the scales back with me, and I was told that we were going to put slips in the paychecks in the morning to be handed out to the employees at 7 o'clock, and so therefore we had about 180 to 200 slips to figure and write." Thus, the preparation of the payroll and the payroll slips to accompany the checks began early in the morning of Friday, June 27, 1980, in order to meet the 7 a.m. goal for distributing those documents.

During the preparation of those documents that morning, Hall's name came up. Whitford testified, "Since Anne's status was up in the air, waiting for Anne to make a decision, Dottie had said to me, 'What if Anne was a Staff Nurse?' And I said, 'Well, how many years has she been here?' And she said, 'Since 1974 on,' or something like that. And I said, 'She has to go to Step 5,' and it would have been a Step 5 Supervisor. It was as simple as that." However, the payroll slip for Hall, Gen-

eral Counsel's Exhibit 6, reflects the notation "#5 Staff Nurse" and it had the new wage rate of \$9 an hour for that position. Whitford explained, "Well, the only thing that I can think of that I did was, I took the Staff Nurse wage form, instead of Supervisor, and transcribed the \$9. Now, the shift differential and the on-call pay was standard, regardless, and that was on both scales, and I just simply transcribed Step 5 Staff Nurse instead of Supervisor." Whitford also pointed to the fact that they were not finished with the preparation of the payroll by 7 a.m., and that employees were lining up outside of Whitford's office. Whitford requested that her secretary come in to assist her and Roe. Whitford was not aware of the error until after December 4, 1980, when Hall produced copies of what later became General Counsel's Exhibit 6 and General Counsel's Exhibit 9 to the Respondent's attorney.

After receiving the information which he had requested from his law office associate, attorney Wolfram telephoned Whitford on Friday, June 27, 1980. Wolfram testified:

Friday morning, sometime in the morning, I called Mrs. Whitford, and I said, "Marie, I have checked out what my concern was, and my conclusion is that you are free to, and within your legal rights, to refuse to accept a self-demotion of a Head Nurse to Staff Nurse." And she said, "Okay. Well, then I am going to go ahead and tell her what I told you before I was going to do, if it was okay; that she can stay on as Head Nurse, because I need my management personnel, but if she doesn't stay on, then I am not going to allow her to be a Staff Nurse."

And we discussed the wording of a memorandum or a letter to Mrs. Hall.

And that was the conclusion of the conversation, and I don't think I followed up on it at all, except sometime the next week, I am sure I asked whether she had sent the message to Mrs. Hall, and what the result had been.

I think, in the same conversation, on Friday the 27th of June with Mrs. Whitford, or possibly in a separate phone call that morning, she said that she had received a resignation almost identical to the earlier one from another Head Nurse on the Surgical Floor and wanting to know if she could respond the same way as she was responding to Mrs. Hall, and I asked, "Does this other Head Nurse have the same duties and responsibilities that you described to me as those of Head Nurses earlier in the week?" And she said, "Yes." I said, "Well, then you can take the same position. That is within your rights to do."

And that was it.

The other head nurse referred to by attorney Wolfram was named Emily Roese. Between 8:30 a.m. and 9:30 a.m. on Friday, June 27, 1980, she had submitted a memo which was essentially the same as the one which Hall had submitted on June 21, 1980. Whitford wrote a letter to Roese which was almost identical in content to the

one which Whitford sent to Hall, and which will be described below. After receiving the letter, Roese and another staff nurse went to Whitford's office and submitted a second memo to her. According to Whitford, Roese told her, "that she still would feel more comfortable in a staff position, asking for immediate resignation from her Medical Unit Head Nurse position." Roese's employment was terminated about lunchtime that day. Whitford testified, "She was no different than Anne, in a supervisory status, and I was treating them both the same."

With regard to Hall's situation that day, Whitford testified, "I had not heard back from Anne on what her decision was. I had already received a strike notice, and it was Friday. I had until, I think, Wednesday of the next week to get my act together with staffing, and I wanted to know what her decision was going to be before the weekend." Whitford prepared a memo to Hall, and she had it delivered to Hall by taxi that same day. A copy of that memo was introduced into evidence as General Counsel's Exhibit 7. In part, it states:

Your memorandum of June 21, 1980 has been received. Please be advised that you have been employed as Emergency Room Supervisor, a managerial position. Our need for you is in this position and no other.

If you do not wish to continue in this position, we will be forced to terminate your employment. Please notify me of your decision before your next scheduled day to work.

After receiving the memo from Whitford, Hall acknowledged that she understood that she could return to work at the hospital as a supervisor. However, at the hearing she said that would not do because she wanted to work as a staff nurse. After receiving the memo, Hall held another meeting regarding the CNA at her house that afternoon.

6. The events on Saturday, June 28, 1980

Hall submitted another memorandum on Saturday, June 28, 1980. A copy of that memo was introduced into evidence as General Counsel's Exhibit 8. In part, it states:

Your memorandum of June 27, 1980 has been received. As I stated in my letter to you, I would feel more comfortable and feel I would be more effective in a staff position.

I would appreciate a statement from you as to the reasons for my dismissal.

Thank you for your reply.

Also that day, Hall asked Roe for her timecard while they were in the coffeeroom. Roe replied that she had already taken care of it. Hall asked whether Roe was refusing to give her timecard to her. Roe said no.

On the way to the emergency room, Roe made a photostatic copy of Hall's timecard. A copy of that photostat was introduced into evidence as Respondent's Exhibit 1. A copy of Hall's timecard, which reflects certain en-

tries made by Hall on the card, was introduced into evidence as General Counsel's Exhibit 5.

Roe was the one who prepared the final paycheck for Hall. Roe testified, "Well, I received a telephone call that I was to prepare her final checks, and I took the little salary card from the index, and there was a little penciled figure that said '9.00' in the corner, and in my haste, I paid off all her benefits and wages at \$9.00." A copy of the attachment to Hall's paycheck was introduced into evidence as General Counsel's Exhibit 9. It had been sent in the mail to Hall.

As indicated in stipulation 13 in section A, herein, Hall's supervisory position in the emergency department was not permanently filled until September 28, 1980. Coleen McClain was the one who became Hall's permanent replacement. Prior to that time, Candy Pierce, who was department head of the cardiac rehabilitation unit, served as the acting head nurse in the emergency department.

At the hearing, Whitford acknowledged that at the time of Hall's termination she was concerned about a shortage of nurses due to the strike situation, and she was worried as to how she was going to staff the hospital. Whitford further acknowledged at the hearing that she would not have terminated Hall if Hall had agreed to remain in her supervisory position. She gave her opinion of Hall as a nurse generally as being "technically excellent." She gave her opinion of Hall as a nurse generally as an emergency room nurse as being "good."

In summary, Whitford gave the following reasons for not employing Hall in a nonsupervisory staff nurse position at the hospital at that point in time: (1) management personnel were needed to run the hospital in the event there was a strike of employees at the hospital; (2) a person who has been in a management position and goes to a staff nurse position "does not always keep the confidences that are within the Nursing management structure"; (3) the difficulty at times for people to give up the authority which they previously have enjoyed; (4) the difficulty for other supervisors in being required to supervise a former supervisor; (5) the acceptance of the former supervisor by her new peers is not what it should be; (6) Whitford's opinion that Hall "was taking the easy way out" after Whitford had told the supervisors and head nurses that the hospital was desperately going to need them not only because of the strike, but also because of the expected caseload due to the long holiday weekend; (7) Whitford's concern that, if she permitted Hall to go from a supervisory position to a staff nurse position, other supervisors and head nurses also would follow Hall's action.

B. The Matters Pertaining to Jones, Zimmerman, and Dillard

There were only three or four instances where a supervisor had been permitted to transfer from a supervisory position to a nonsupervisory staff position. Whitford recalled three of those persons by name. They were: Barbara Jones, Bert Zimmerman, and Aranda Dillard.

Jones made such a request by letter dated January 29, 1978. A copy of her letter was introduced into evidence as General Counsel's Exhibit 12. At the time of her letter, Jones held three different positions. They were: inservice director; relief day supervisor; and infection control nurse. For some time after she submitted her letter, Jones continued to work on a day-to-day basis in her supervisory positions. Jones explained, "I came to be reassigned to a staff position as Mrs. Whitford saw fit. As I outlined in my letter, I agreed to be assigned on a daily basis, with Mrs. Whitford, as Director, setting priorities, which she must, and I received those assignments each day, and, over a period of months, I gradually was relieved of my duties, all but staff position. And I was eventually allowed the privilege of clocking in on a daily basis." (See G.C. Exh. 13 regarding the instructions to Jones concerning her timecard.) There was no strike situation pending at the time of Jones' letter.

General Counsel's Exhibit 11 reflects the personnel history of Zimmerman. He worked for the Respondent during the period from January 9, 1978, to October 18, 1980. He began his employment at the hospital as a supervisor, but his status was changed to a staff position on March 6, 1978, at Zimmerman's request. He was immediately replaced in his supervisory position by Mary Lou Powers. There was no change in his rate of pay at that time, but Zimmerman said that he began to punch the timeclock. There was no pending strike at the hospital at the time of Zimmerman's change in status.

General Counsel's Exhibit 10 reflect the personnel history of Dillard. She worked for the Respondent during the period from August 17, 1974, to May 15, 1977, when she voluntarily quit work. She became the head nurse in unit B on November 3, 1974, and she became a day supervisor in nursing administration on October 31, 1976. She received a written warning regarding her job performance on January 5, 1977. (See the letter attached to the warning notice for the details.) On April 3, 1977, Dillard was transferred from her day supervisor position to a staff position. There is no evidence, nor any contention, that a strike situation was pending at the time of her transfer.

Conclusions

As the facts show set forth in section 3, herein, Hall's unilateral decision to resign her supervisory position and to transfer to a nonsupervisory position of staff nurse was not accepted by Whitford. Instead, Whitford said she would get back to Hall later, and she urged Hall to reconsider her decision. As the facts show in section 4, herein, Hall's status was not changed by the hospital in its personnel records during her last week of employment. Hall continued to work on 4 days that week at the hospital, and Whitford was unaware that Hall was performing her duties any differently than before. It will be remembered that about 75 percent of Hall's working time prior to June 21, 1980, was spent performing duties which nonsupervisory registered nurses also performed, and that some of her supervisory responsibilities did not need to be taken care of during her last week of employment. For example, the work schedule for the following month had been prepared by June 15, 1980, and, for example, no employee evaluations were due to be done that week. The single instance of Hall's declining to approve an exchange of days off by two nurses appears to be the only supervisory function which arose that week which Hall failed to perform. The evidence does not show that Whitford was even aware of Hall's refusal to handle that matter.

As set forth in section 5, herein, the new payroll and accompanying payroll slips were prepared on a rush basis with apparent haste. The checks were already late since the checks were normally distributed to employees about 3 p.m. on Thursdays. Whitford and Roe arrived early at the hospital to attempt to make the distribution by the 7 a.m. goal. Considering the circumstances under which the 180 to 200 payroll slips were prepared, I conclude that the payroll slip for Hall should be given less weight in this matter. Similarly, Hall's final check, as described in section 6, simply perpetuated the error, which had resulted from the hasty preparation of the payroll slips on the prior morning.

Without repeating all of the findings of fact which have already been set forth earlier, I conclude that the evidence shows that Hall continued to be a statutory supervisor during her last week of employment with the hospital. Thus, at the time of her termination, I conclude that Hall was a supervisor, and that her termination by the Respondent did not violate Section 8(a)(1) and (3) of the Act under the circumstances present in this case.

Turning now to the alternative theory urged by the General Counsel, it will be remembered that the Respondent treated Emily Roese in the same manner that it treated Hall. (See section 5, herein.) There is no indication that Roese engaged in union activities, however, and there is no allegation that the Respondent discriminated against Roese. The situations regarding Jones, Zimmerman, and Dillard are described in section B, herein. However, the Respondent points out persuasively that there was no strike situation pending at the time of those changes from supervisory status to nonsupervisory status, and the warning given to Dillard suggests another reason for her change in status. Thus, I conclude that the Respondent has shown that those persons were changed into nonsupervisory positions under different circumstances than existed when Hall attempted to change her

As set forth in section 6, herein, Whitford has given several plausible reasons as to why she would not employ Hall in a staff nurse position under the circumstances which existed at that point in time. Her reasons must be viewed in the light of her urgent appeal to the supervisors, as described in section 1, herein, for their help in staffing the hospital during the anticipated increase in patient load due to the potential strike situations and the long holiday weekend. Thus, Whitford's opinion that Hall "was bugging out on me" indicates that Whitford felt that Hall was avoiding her responsibilities at a time when the hospital needed her most.

The Board stated in *Hanover Industries, Inc.*, 246 NIRB 656, 657 (1979), "Finally, while evidence of union animus or other unfair labor practices is not necessary to support a finding of an unlawful discharge, we cannot

help but note that Respondent was not found to have engaged in any other unfair labor practices in this proceeding." That observation is valid here because the evidence does not establish that the Respondent harbored animus against its employees' organizational rights, and there is no evidence here, nor even any allegations, that the Respondent committed any other unfair labor practices.

After considering all of the foregoing, I conclude that the reasons given by the Respondent for its refusal to employ Hall in a nonsupervisory staff nurse position are not pretexts to hide a discriminatory motive. Thus, the situation here is distinguishable from the situation present in Senftner Volkswagen Corporation, 257 NLRB 178 (1981), where pretexts were found. I further conclude that the Respondent has established that the refusal to employ Hall in a nonsupervisory staff nurse position would have taken place even in the absence of any union activities or protected concerted activities by Hall. Wright Lines, a Division of Wright Line, Inc., 251 NLRB 1083 (1980). Therefore, I conclude that a preponderance of the evidence does not establish that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. Accordingly, I must recommend to the Board that the General Counsel's complaint be dismissed.

With regard to Case 31-RC-4891, I must recommend to the Board that the challenge to the ballot cast by Hall be sustained because she was not an eligible voter in the representation election held on March 6, 1981. I further

recommend to the Board that a revised tally of ballots be issued, and that a Certification of Results be issued.

CONCLUSIONS OF LAW

- 1. The Respondent is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.
- 2. The Charging Party Union and the California Nurses Association are labor organizations within the meaning of Section 2(5) of the Act.
- 3. The Respondent has not engaged in the unfair labor practices alleged in the General Counsel's complaint in this proceeding for the reasons which have been set forth above.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue this recommended:

ORDER1

It is hereby ordered that the complaint in this proceeding be dismissed in its entirety.

¹ In the event that no exceptions are filed, as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order herein shall, as provided in Sec. 102.48 of the Board's Rules and Regulations, be adopted by the Board and shall become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.